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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77298497
Applicant	Formax, Inc.
Applied for Mark	POWERMAX
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re	: Trademark Application of	:
	: Formax, Inc.	:
	:	:
For	: POWERMAX	: Examining Attorney
	:	: Chrisie Brightmire King
Serial No	: 77298497	:
	:	:
Filed	: October 8, 2007	: Attorney Docket No. 5142800-00022

APPLICANT'S APPEAL BRIEF

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The Applicant, Formax, Inc. ("Applicant"), appeals to the Trademark Trial and Appeal Board from the Examining Trademark Attorney's ("Examining Attorney") August 24, 2008 issuance of a final refusal to register the trademark POWERMAX.

I. THE GROUNDS FOR FINAL REFUSAL

The Examining Attorney has refused registration of Applicant's POWERMAX mark ("Applicant's Mark") applied to "industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities and parts therefor," on the basis that it is alleged to be confusingly similar, under Trademark Act Section 2(d) (15 U.S.C. §1052(d)), to Registration No. 2817553 (the "Cited Registration") held by Braun GmbH ("Braun") for the mark POWERMAX applied to "electric food blenders" (the "Cited Mark"). The Examining Attorney has acknowledged that thirty-two other registered marks comprised of the term powermax (and a number of other marks containing the term powermax) exist without a likelihood of confusion, but has noted that such other registrations cover unrelated goods. As the Examining Attorney has implicitly acknowledged that marks consisting of the term powermax may coexist without a likelihood of confusion when applied to unrelated goods, the Examining Attorney's final refusal rests upon the conclusion that electric food blenders and industrial food packing and packaging machines are closely related.

Applicant submits that the Examining Attorney has erred; the goods upon which Applicant and Braun use their respective POWERMAX marks are unrelated and sufficiently distinguishable so as not to cause a likelihood of confusion. The principal error on the part of the Examining Attorney is the failure to recognize that Applicant's goods do not consist of merely a commercial food slicer of the sort that may be found in a deli, but are rather industrial packing and packaging machines used in a meat-packing plant, cheese packaging facility and other food packing, processing and packaging plants. Applicant has been specific in the identification of goods for its application: "industrial electric food processing machines, namely, machines for slicing food products for packing and

packaging in commercial quantities and parts therefor" (emphasis added).

Moreover, the Examining Attorney overlooked the fact that the established, likely-to-continue trade channels (based upon the fundamentally different nature of the goods) and the conditions under which sales are made are completely different. Finally, the buyers for goods marked with the Cited Registration and goods marked with the Applicant's Mark are entirely different. In light of these factors and the other *DuPont* factors discussed in detail below, the refusal of registration should be reversed, and Applicant's Mark published for purposes of opposition.

II. SUMMARY OF THE PROSECUTION HISTORY

This appeal stems from Applicant's October 8, 2007 filing of application Serial No. 77298497 to register the mark POWERMAX.

In an Office Action dated January 17, 2008, the Examining Attorney refused registration on the basis of an alleged likelihood of confusion with the Cited Mark. The Examining Attorney also found Applicant's identification of goods indefinite as to whether the identified goods are electric or hand-operated/non- electric. Applicant filed a response on July 17, 2008 ("Response") addressing the Section 2(d) refusal with an analysis of the relevant *DuPont* factors and amending its identification to clarify that the goods are electric.

In a final Office Action dated August 24, 2008 ("Final Action"), the Examining Attorney made final her refusal under Section 2(d), arguing that electric food blenders are related to electric food slicers and presented evidence that electric food blenders may be sold together with deli slicers and similar commercial food slicers.

On February 17, 2009 Applicant filed a Request for Reconsideration ("Request for Reconsideration") introducing additional evidence concerning the characteristics of Applicant's packing and packaging equipment as compared to electric food blenders and the commercial slicers identified by the Examining Attorney, and further enumerating the fundamental differences between the parties' goods, channels of trade and purchasers. The Examining Attorney denied Applicant's

Request for Reconsideration on March 21, 2009 ("Reconsideration Letter").

III. STATEMENT OF FACTS

Applicant seeks registration of the trademark POWERMAX for use on, and in connection with the marketing of a "industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities and parts therefor."

There are currently at least forty other active trademark registrations for marks that include the term POWERMAX. *See* Response, Exhibits A and F. Of these forty registrations, thirty-two are for marks in which the content of the mark is identical to the Cited Mark. *Id.* A fact acknowledge by the Examining Attorney. *See* Final Action.

As is typical of industrial food processing machines design for packing and packaging, Applicant's POWERMAX product consists of large, high-powered equipment capable of processing the large quantities of food products (i.e., at rates measured in tons of food per hour). In fact, Applicant's equipment measures approximately 74.87 inches by 115.55 inches by 177.72 inches, weighs roughly 10,240 lbs, and features a slicing throat measuring 8 inches by 18.5 inches. *See* Affidavit of Brian Sandberg, Exhibit to Response ("First Affidavit"). Applicant's industrial machine has a conveyor belt through which sliced food products move, has a blade speed of up to 1500 rpm and is operated by a touch screen. *Id.* It is a complex machine which combines a large slicing throat with up to four independent product drives and features a revolutionary Safety Laser Scanning System. *Id.* Applicant's industrial machine is designed to slice high volumes of meat and has the largest slicing throat in the industry. *See* meatinfo.co.uk printout entitled *A More Precise Slice*, Exhibit to Request for Reconsideration. In fact, Applicant's industrial equipment can slice up to 3.6 tons of meat products per hour and up to 120 stacks of sliced meat per minute. *See* Affidavit of Brian Sandberg, Exhibit to Request for Reconsideration ("Second Affidavit").

Each of Applicant's machines sold must be transported to the purchaser's meat packing or food product manufacturing plant by truck, unloaded with a forklift and then placed into position. *Id.*

The machine is then leveled to ensure proper operation and connected to the plant's utilities. *Id.* This process includes hardwiring the machine to the plant electrical services, as well as, making the proper connections to the plant's water and air. *Id.* This is an involved process, typically requiring 2 full days to complete. *Id.* Moreover, as part of the approximately $500,000 purchase price, Applicant, because of the complexity of the machine, typically provides 5 days worth of on-site operator and maintenance training to the purchaser's employees. *Id.*

The mark in Registration 2817553, POWERMAX, is registered by Braun for "electric food blenders." As indicated by the evidence submitted by the Examining Attorney, electric food blenders are appliances that are used in household and light commercial settings. Specifically, the Examining Attorney conducted a "search of the Internet" and provided evidenced depicting various blenders. *See* Final Action, Exhibit #s 23-31; 61-62; 67-68. All such electric food blenders shown in the submitted evidence are countertop-sized devices. *See Id.* The prices for the electric food blenders identified in these Internet searches, including those classified as "Commercial Blenders," range from $39.95 to $1,049.00. *Id.* Moreover, all of the blenders depicted can be purchased directly from the appliance websites upon which they are shown by the mere click of a computer mouse, and are seemingly ready for use just by plugging them into a wall socket. *Id.*

The attributes of the specific POWERMAX product sold by Braun are consistent with those of the various electric food blenders identified by the Examining Attorney as typical. Braun's product is an electric household blender designed to make drinks, fruit purees, shakes, sorbets, frozen drinks and soups in consumer kitchens. *See* Response, Exhibits B & C. Braun's product measures only 8.5 inches by 11 inches by 14.88 inches – the perfect size to sit on a kitchen countertop or be stored in a kitchen cupboard. *Id.* Braun's product is generally purchased by private individuals for personal use, and generally sells for less than $100. *Id.*

The examining attorney also submitted evidence of electric food slicers claimed to be related to electric food blenders. *See* Final Action, Exhibit #s 20-22; 63-66; 69-79. The slicers depicted in

the Examining Attorney's search are countertop slicers "ideal for convenience operations, chain restaurants, supermarkets, deli and independent food retail operations serving sandwiches, salads and other products" *See Id.* at #71. The prices for the electric food slicer identified range from $179.00 to $6,191.00. *See* Reconsideration Letter, Exhibit #s 49-50; 54 and Final Action, Exhibit #s 20-22; 63-66; 69-79.

IV. ARGUMENT

"The PTO may refuse to register a trademark if it so resembles a previously registered mark 'as to be likely to cause confusion or to cause mistake, or to deceive.'" *On-Line Careline, Inc. v. America Online, Inc.*, 228 F.3d 1080, 1084, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000) *citing* 15 U.S.C. § 1052(d) (1999). The court in *In re E.I. DuPont DeNemours & Co.*, enumerated thirteen factors to be considered in determining whether such a likelihood of confusion exists. *See In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (C.C.P.A. 1973). However, "[t]he determination of a likelihood of confusion does not require examination and findings as to each and every *DuPont* factor." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1372 (Fed. Cir. 2002). "Rather, different *DuPont* factors may play dominant roles in determining likelihood of confusion depending on the evidence in each case." *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 352, 22 U.S.P.Q.2d 1453 (Fed. Cir. 1992); *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 U.S.P.Q.2d 1531 (Fed. Cir. 1997) ("[N]ot all of the *DuPont* factors are relevant or of similar weight in every case.") In the instant matter, a handful of the *DuPont* factors are relevant, and together, weigh heavily in favor of a finding that the refusal to register under Section 2(d) is improper. Specifically, the following factors are determinative in this matter:

1) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
2) The similarity or dissimilarity of established, likely-to-continue trade channels.
3) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful,

sophisticated purchasing.

DuPont, 476 F.2d at 1361.

A. THE SIMILARITY OF THE APPEARANCE OF THE MARKS IS NOT DETERMINATIVE.

The Examining Attorney has acknowledged the existence of thirty-two current trademark registrations for the POWERMAX term identical in presentation to the Applicant's Mark and the Cited Mark. *See* Response, Exhibits A and E and Final Action. Obviously there can be multiple registrations for the term POWERMAX as long as the goods to which the term is applied are different. Thus, the fact that both the Cited Mark and the Applicant's Mark consist of the same word is not determinative. *See Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.,* 269 F.3d 270, 282, 60 U.S.P.Q.2d 1609 (3rd Cir. 2001) ("mark similarity is not necessarily determinative of likely confusion, particularly when the products do not directly compete.")

It is clear that the strength of the term POWERMAX is weakened by the number and extent of its use in other marks. *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 653 (10th Cir. 1996) ("The greater the number of identical or more or less similar marks already in use on different kinds of goods, the less is the likelihood of confusion between any two specific uses of the weak mark.")

In her Final Action, the Examining Attorney does not dispute that the weakness of the POWERMAX mark means that multiple users of the identical mark can co-exist without confusion. Instead, she distinguishes the thirty two existing registrations on the basis that they are for unrelated goods. Accordingly, her refusal rests on her conclusion that the goods identified in Applicant's Mark are so related to the goods identified in the Cited Registration as to make confusion between the two marks likely. Applicant addresses this argument below.

B. THE PARTIES' GOODS ARE SO DISSIMILAR THAT CONFUSION IS ENTIRELY UNLIKELY

The second *DuPont* factor requires analysis of the "similarity or dissimilarity and nature of

the goods or services..." *DuPont*, 476 F.2d at 1361. Notably however, "[g]oods may fall under the same general product category but operate in distinct niches. When two products are part of distinct sectors of a broad product category, they can be sufficiently unrelated that consumers are not likely to assume the products originate from the same mark." *Checkpoint Sys.*, 269 F.3d at 288; *See also Davis v. Walt Disney Co.*, 430 F.3d 901, 77 U.S.P.Q.2d 1309 (8th Cir. 2005) (finding unrelated a children's movie broadcast on cable television and a non-fiction program broadcast on cable television); *Bell v. Streetwise Records, Ltd.*, 761 F.2d 67, 226 U.S.P.Q. 745 (1st Cir. 1985) (finding unrelated live entertainment and phonorecords); *Harlem Wizards Entm't Basketball, Inc. v. NBA Props., Inc.*, 952 F. Supp. 1084 (D.N.J. 1997) (finding unrelated show basketball team and professional basketball team).

While the Cited Mark and the Applicant's Mark are used in connection with food, the similarities end with the description of the general product category. The Applicant's Mark and the Cited Mark attach to entirely distinct goods used by two entirely different consuming groups. Applicant has identified, and applies its mark to, a massive industrial packing and packaging machine for use in a food packing and packaging plant, whereas Braun has identified an ordinary appliance (i.e., an "electric food blender") in the Cited Registration. "Numerous cases [ ] illustrate that even when two products or services fall within the same general field, it does not mean that the two products or services are sufficiently similar to create a likelihood of confusion." *Harlem Wizards*, 952 F. Supp. at 1095.

The most relevant considerations in this inquiry into the similarity or dissimilarity of the are the appearance of the goods and the price of such goods. *See Pignons S.A. de Mechanique v. Polaroid Corp.*, 212 U.S.P.Q. 246, 250 (1st Cir. 1981). The court in *Pignons*, in analyzing two single lens reflex cameras found their appearance to be "strikingly different--so much so that one could not be mistaken for the other." *Id.* In further analyzing the differences in the parties' goods, the *Pignons'* court found relevant the fact that Pignons' cameras, which range in price from $500 to

$1,395, were "substantially more expensive" than Polaroid's cameras, which were priced in the $132 to $233 range. *Id.*

With regard to the products at issue, their physical appearance is so overwhelmingly different, even more so than the two cameras compared in *Pignons*, that no consumer could mistake the products for one another, or believe that they originate from the same source. Industrial packing and packaging equipment like the Applicant's POWERMAX product consists of large, high powered machines designed to slice high volumes of meat. As described above, Applicant's machine weighs roughly 10,240 lbs, has a blade speed of up to 1500 rpm and is capable of slicing up to 3.6 ***tons*** of meat products per hour and up to 120 stacks of sliced meat per minute. The equipment identified in Applicant's application is in fact so large in size that the installation of each machine requires special procedures for the transport, unloading and installation of the equipment and special training for its operators (as described in detail above). Under no circumstances could Applicant's equipment be mistaken for a blender, or any other similar appliance (such as an ordinary food slicer) for either household or ordinary commercial use.

All of the evidence in the record indicates that "electric food blenders" are understood to be countertop-sized kitchen appliances. All of the electric blenders identified by the Examining Attorney (*see* Exhibits to Final Action, #s 23-31; 61-62; 67-68) are clearly used in residential kitchens or light commercial settings such as delis and juice bars to mix ingredients or puree food. None of these products are even remotely similar to Applicant's industrial machine used for packing and packaging food products. In particular, the product sold by Braun is described as "a very handsome addition to any kitchen counter" and has been classified as a small kitchen appliance for the home. *See* consumerreports.org and Wal-Mart website printouts, Exhibits to Request for Reconsideration.

There is a tremendous price disparity between the parties' products. Applicant's industrial food processing machines cost approximately $500,000 whereas the most expensive "electric food

blender" the Examining Attorney was able to locate has a price *two orders of magnitude* lower than Applicant's machine (i.e., $1,049 vs. $500,000). In fact, Braun's countertop-sized blender is sold for under $100. *See* Exhibits to Response and Request for Reconsideration.

The Examining Attorney has argued that even if "electric food blenders" are not related to industrial food packing and packaging equipment, they are related to a commercial slicers. In support of this argument, she has provided evidence of deli meat slicers being sold on the same websites and in the same stores as blenders. However, she has merely assumed that deli slicers are related to the industrial food packing and packaging equipment sold by Applicant. This is not the case. All of the meat slicers depicted in the Examining Attorney's evidence are countertop slicers rather than equipment used in food packing plants to pack and package commercial quantities of food. In fact, the slicers depicted in the Examining Attorney's search are countertop slicers "ideal for convenience operations, chain restaurants, supermarkets, deli and independent food retail operations serving sandwiches, salads and other products" *See* Final Action, Exhibit #71.

The Examining Attorney has failed to submit any evidence that such countertop meat slicers are related in any way related to an "industrial" machine used in "packing and packaging in commercial quantities." In fact, the physical appearance of Applicant's enormous machine (weighing over 10,000 lbs and designed to slice ***tons*** of food per hour) is overwhelmingly different than any of the deli slicers identified in the evidence submitted by the Examining Attorney – once again, even more so than the two cameras compared in *Pignons*. No consumer could mistake the products for one another, or believe that they originate from the same source. Moreover, the price differential between the deli slicers cited by the Examining Attorney (a mere $179.00 to $6,191.00) is again close to *two orders of magnitude* less than the $500,000 price for Applicant's industrial processing machine.

Similarly, the registrations cited by the Examining Attorney as support for the proposition that the goods are related, identify a wide range of household products. For example, the HOBART

registration (Serial No. 73048069) covers "electrically operated food preparation machines and household appliances such as mixers, peelers, choppers and dicers." *See* Reconsideration Letter, Exhibit #s 22-24. Neither this registration, nor the other registrations cited by the Examining Attorney, however, cover both electric food blenders for household use and industrial slicers for use by meat-packaging companies and food product manufacturers to slice and package high volumes of food.

Based upon the foregoing evidence, it is highly unlikely that any consumers would believe that Applicant's goods originate from the same source as those featuring Braun's mark.

C. THE PARTIES' PRODUCTS ARE SOLD IN DIFFERENT, ESTABLISHED, LIKELY-TO-CONTINUE TRADE CHANNELS.

The third relevant *DuPont* factor analyzes the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. "This factor asks where and how the parties' goods or services are sold." 5-5 Gilson on Trademarks § 5.06. This "channels of trade" factor is most potent when the parties sell their goods in very different outlets, a finding that typically tilts the balance against a finding of likely confusion." 5-5 Gilson on Trademarks § 5.06. As indicated in the Trademark Manual of Examination Procedures 2d (hereinafter "TMEP") § 1207.01(a)(i), "if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then even if the marks are identical, confusion is not likely." *See also Shen Mfg Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field) *and Quartz Radiation Corp. v. Comm/Scope Co.*, 1 U.S.P.Q.2d 1668 (TTAB 1986) (QR for coaxial cable held not confusingly

similar to QR for various products (e.g., lamps, tubes) related to the photocopying field).

Consumers, while they could view Applicant's product on-line, could not purchase Applicant's industrial machine for use in food packing and packaging from any website, nor could a consumer walk into a store to purchase Applicant's equipment. Instead, the customized purchase of Applicant's industrial equipment is a major capital expenditure for deliberate, well-informed meat-packing companies and food product manufacturers and their suppliers and subcontractors. In fact, Applicant's industrial machine is sold through a dedicated sales force in the United States to companies such as Plumrose USA and other large food manufacturers and meat and poultry processors. *See* Second Affidavit. In light of the cost Applicant's equipment and installation services, customers purchasing Applicant's industrial machine, do so only after significant negotiations of the terms of sale. *See* First Affidavit. These customers require Applicant's equipment because of its industrial capacity for use in packing and packaging, and have no use for a counter-top sized non-industrial sized slicer. *See* Second Affidavit.

As indicated by the Internet searches conducted by the Examining Attorney and Applicant, electric food blenders are mass market electronic appliances that can generally be expected to be sold through retail stores, online stores and similar mass market trade channels. *See* Exhibits to Final Action, Response and Request for Reconsideration. With a price range of $39.95 to just over $1,000.00, it is evident that electric food blenders are not sold through a dedicated sales force. *Id.*

The Examining Attorney, in refusing registration, argued that blenders and food slicers are sold and marketed in the same trade channels. There is, however, no evidence that either food blenders, or the food slicers identified by the Examining Attorney as being sold in the same trade channels as food blenders, are marketed with Applicant's large, industrial equipment for food packing and packaging. The Examining Attorney's argument appears to be premised upon the assumption that the deli food slicers identified by the Examining Attorney are similar to or related to an industrial slicing machine for food packing and packaging, but no evidence has been submitted to

support this assumption and, as noted above, such assumption is completely unfounded. Instead, it is evident that blenders and food slicers, on one hand, and Applicant's equipment on the other hand are not "marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source." Here, it is clear that the established, likely to continue trade channels employed by Applicant and Braun are completely separate, and no confusion could be deemed likely.

D. PURCHASERS OF APPLICANT' PRODUCTS ARE CAREFUL AND SOPHISTICATED, MAKING CONFUSION WHOLLY UNLIKELY.

"There is always less likelihood of confusion where goods are expensive and purchased after careful consideration." *Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc*, 718 F.2d 1201, 220 U.S.P.Q. 786, 790 (1st Cir. 1983). "If the goods or services are relatively expensive, more care is taken and buyers are less likely to be confused as to the source or affiliation." 4 McCarthy on Trademarks and Unfair Competition § 23:95 (4th ed. 2007); *See also Pignons*, 212 U.S.P.Q. at 252 ("Purchaser sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care.")

"The decision to buy a machine worth thousands of dollars is obviously not done on impulse, and involves a careful consideration of the reliability and dependability of the manufacturer and seller of the product." *Astra Pharm.*, 220 U.S.P.Q. at FN7. "Many cases state that where the relevant buyer class is composed of professionals or commercial buyers familiar with the field, they are sophisticated enough not to be confused by trademarks that are closely similar...Thus, while two marks might be sufficiently similar to confuse an ordinary consumer, a professional buyer or an expert in the field may be more knowledgeable and will not be confused." 4 McCarthy on Trademarks and Unfair Competition § 23.101 (4th ed. 2007) *citing e.g. Sunbeam Lighting Co. v. Sunbeam Corp.*, 86 U.S.P.Q. 240 (9th Cir. 1950) and *Save-A-Stop, Inc. v. Sav-A-Stop, Inc.*, 121 U.S.P.Q. 232 (1959).

In the instant matter, the purchasers of the Applicant's goods consist not of the general public, but rather of meat-packing companies and food product manufacturers and their suppliers and subcontractors. They are purchasing a $500,000 piece of equipment which allows them to slice industrial-sized volumes of food products for mass packaging. It is unquestionable that these purchasers, because of the method of sale and high price of the product, can be classified as "commercial buyers familiar with the field," and thereby deemed unlikely to be misled by any similarity existing between the Applicant's and Braun's marks.

In contrast, purchasers of electric food blenders are purchasing a kitchen appliance for, at the very most, just over a thousand dollars. Whether such purchasers are buying the appliance for household use or commercial use, they would never be inclined to believe such a blender originates from the same source as a $500,000 industrial machine. Moreover, it is unlikely the average kitchen appliance purchaser would ever come in contact with Applicant's commercial product.

The Examining Attorney erred in affording only minor weight to this *DuPont* factor. Upon examination, it is clear that this factor weighs so heavily against a finding of likelihood of confusion, for it is virtually inconceivable that any household or commercial appliance purchaser would mistakenly purchase Applicant's massive industrial slicer costing $500,000 when it intended to buy a countertop household blender for a few hundred dollars (or even one of the ordinary deli slicers described in the evidence submitted by the Examining Attorney for a few thousand dollars), nor would such consumer be led to believe that these entirely distinct product originate from the same source. It is likewise virtually inconceivable that any meat-packing company or food product manufacturer would purchase an everyday electric food blender (or even one of the ordinary deli slicers described in the evidence submitted by the Examining Attorney) for use on the production line of a meat packing plant or food processing plant or, for that matter, purchase Applicant's $500,000 industrial machine without being fully familiar with all aspects of the product and its manufacturer.

The heightened sophistication of Applicant's purchasers is crucial in the instant matter and

precludes a finding of any likelihood of confusion stemming from the similarity of the marks. Failure to appreciate the weight of this factor led to the erroneous conclusion that confusion is likely. This factor alone supports a finding that no likelihood of confusion exists between the parties' marks and registration of Applicant's Mark is warranted.

E. THE REMAINING DUPONT FACTORS ARE NOT RELEVANT TO THE LIKELIHOOD OF CONFUSION INQUIRY.

The remaining *DuPont* factors do not weigh heavily for or against a finding of likelihood of confusion, and are therefore not relevant in our analysis. *See e.g. Checkpoint Sys. Inc.*, 269 F.3d at 280 *citing A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.,* 237 F. 3d 198, 215 (3d Cir. 2000) ("not all [likelihood of confusion] factors will be relevant in all cases; further, the different factors may properly be accorded different weights depending on the particular factual setting.") For example, there is no evidence that Braun's mark is a famous or popular mark entitled to wide latitude of legal protection and Applicant is unaware of any instances of actual confusion between Applicant's Mark and Braun's mark.

V. CONCLUSION

Applicant respectfully requests that this Board reverse the Examining Attorney's final refusal of registration and enable its application to proceed to publication on the Principal Register.

Date: June 1, 2009

Respectfully submitted,

By: Christine E. Obrochta

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